INDEX

	Page
Statement	2
Discussion	6
Conclusion	16

CITATIONS

Cases:

Auto Workers v. *O'Brien*, 339 U.S. 454	7
Bethlehem Steel Co. v. *New York State Labor Relations Board*, 330 U.S. 767	7
Cannery Workers Union, etc., 159 NLRB No. 47	10
Gibbs Corp., 131 NLRB 955, enforced, 308 F. 2d 247	9
Hercules Powder Co. v. *National Labor Relations Board*, 297 F. 2d 424	9
Hill v. *Florida*, 325 U.S. 538	7
Industrial Union of Marine and Shipbuilding Workers v. *National Labor Relations Board*, 65 LRRM 2629, setting aside 159 NLRB No. 95	10
John Hancock Mutual Life Insurance Co. v. *National Labor Relations Board*, 191 F. 2d 483	9
Local 138, Operating Engineers (Skura), 148 NLRB 679	8, 10
Local 743, Int. Ass'n of Machinists v. *United Aircraft Corp.*, 337 F. 2d 5	9
Mortensen v. *Board of Review*, 21 N.J. 242, 121 A.2d 539	13
Moving Pictures Machine Operators v. *National Labor Relations Board*, 65 LRRM 3020	10
National Labor Relations Board v. *Clearfield Cheese Co.*, 213 F. 2d 70, enforcing 106 NLRB 417	9
National Labor Relations Board v. *Gullett Gin Co.*, 340 U.S. 361	15
National Labor Relations Board v. *Lamar Creamery Co.*, 246 F. 2d 8	9
National Labor Relations Board v. *Syracuse Stamping Co.*, 208 F. 2d 77	9
National Licorice Co. v. *National Labor Relations Board*, 309 U.S. 350	11

Cases—Continued Page

North River Logging Co., In the Matter of, 15 Wash. 2d 204, 130 P.2d 64 13
Roberts v. *National Labor Relations Board*, 350 F. 2d 427, enforcing 148 NLRB 674 9-10
San Diego Building Trades Council v. *Garmon*, 359 U.S. 236 7
Sherbert v. *Verner*, 374 U.S. 398 7
Speiser v. *Randall*, 357 U.S. 513 7
Terral v. *Burke Construction Co.*, 257 U.S. 529 ..... 7, 10
Testa v. *Katt*, 330 U.S. 386 15
Unemployment Compensation Commission of Alaska v. *Aragon*, 329 U.S. 143 13

Statutes:

National Labor Relations Act, as amended (29 U.S.C. 151, *et seq.*):

Section 7 ..... 8, 9
Section 8 8
Section 8(a)(1) 2, 3
Section 8(a)(3) 2, 3
Section 8(a)(4) 9
Section 8(a)(5) 3
Section 8(b)(1)(A) 9
Section 10 8
Section 10(a) 8
Section 10(b) 8

Florida Unemployment Compensation Law:

Section 443.06(4) 4, 6, 12

Miscellaneous:

Lesser, *Labor Disputes & Unemployment Compensation*, 55 Yale L. J. 167 (1945) 13
Lewis, *The Concept of "Labor Disputes" in State Unemployment Insurance Laws*, 8 B.C. Ind. & Comm. L. Rev. 29 (1966) 13
Lewis, *Unemployment Compensation in Labor Disputes*, (Upjohn Institute for Employment Research, 1964) 12
Note, *Unconstitutional Conditions*, 73 Harv. L. Rev. 1595 (1960) 8

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 48

MINNIE E. NASH, PETITIONER

v.

FLORIDA INDUSTRIAL COMMISSION, ET AL.

ON WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD AS AMICUS CURIAE

Petitioner challenges the holding of the Flordia Industrial Commission [1] that she was disqualified to receive State unemployment compensation, to which she was otherwise entitled, solely because she had filed unfair labor practice charges with the National Labor Relations Board contesting the lawfulness of her dis-

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[1] The decision of the Commission's Appeals Referee (R. 34-40) was affirmed without opinion by the Commission's Board of Review. A petition for a writ of certiorari to the Commission (R. 49-50) was denied by the Florida District Court of Appeal (R. 58-59). This Court granted a writ of certiorari to the Florida District Court of Appeal (R. 61; 386 U.S. 990).

missal from employment. Because we believe that the decision below conflicts with the National Labor Relations Act (29 U.S.C. 151, *et seq.*) and would seriously impair the work of the National Labor Relations Board in administering that Act, we file this memorandum, *amicus curiae*, urging reversal.

STATEMENT

The relevant facts are not disputed. Petitioner, Minnie Nash, began working for respondent, Stanley Building Specialties Company, a division of respondent Stanley Works, in 1961 or 1962 (R. 14, 35). On January 31, 1965, she joined a strike against the Company called by the Steelworkers Union, the employees' certified bargaining representative, in support of its effort to negotiate a new contract (R. 11-12, 14, 35). The strike failed to close down the Company's operations, and, on March 30, the Union unconditionally offered to return the strikers to their jobs (R. 12, 35). On April 5, the Company agreed to take back some of the strikers, including Nash, and the picketing was terminated (R. 12, 15, 35). On April 6, the Union filed charges with the National Labor Relations Board, alleging that the Company's refusal to reinstate the remaining strikers violated Section 8(a)(3) and (1) of the National Labor Relations Act (R. 12, 36).[2]

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[2] Section 8(a)(3) makes it an unfair labor practice for an employer "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization * * *." Section 8(a)(1) makes it an unfair labor practice for

Nash returned to work on April 14, 1965 (R. 15, 36). On May 16, she was laid off by the Company due to "slow production", and she immediately applied to the Florida Industrial Commission for unemployment compensation (R. 1, 13, 15, 26) and began receiving such benefits as of that date (R. 18). On June 17, the Union filed charges with the Board on behalf of Nash, alleging that her layoff violated Section 8(a)(3) and (1) of the Act (R. 13, 15, 36).[3] Nash con-

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an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7", which includes the right to strike. The charges filed on April 6, 1965, were subsequently sustained by the Board. See, *infra*, n. 3.

[3] On August 13, 1965, the Board's General Counsel issued a complaint incorporating the charges with respect to Nash and other employees who had been laid-off, as well as the charges previously filed on April 6 with respect to employees whom the Company had refused to reinstate at the end of the strike. The complaint was sustained by the Board on August 8, 1967 (166 NLRB No. 110). The Board held that the strike which had begun on January 31, 1965, was caused by the Company's failure to bargain in good faith as required by Section 8(a)(5) and (1) and was, therefore, an unfair labor practice strike. The Board further held that the Company was obliged to reinstate the strikers at the end of the strike in April 1965 and that it was a violation of Sections 8(a)(3) and (1) subsequently to lay-off reinstated strikers in preference to employees hired as replacements during the strike. The Board ordered the Company to "offer all the strikers, including those who were reinstated but subsequently laid off, full and immediate reinstatement to their prestrike or substantially equivalent jobs with all the rights and benefits they would have accumulated but for the discrimination against them," together with back pay (166 NLRB No. 110, p. 12). Petitions to review the Board's decision and order have been filed in the Courts of Appeals for the Sixth (18100) and the District of Columbia (21193) Circuits.

tinued to receive unemployment compensation until October 5, when the Company voluntarily reemployed her (R. 16, 21, 36).

On November 15, however, the Claims Examiner for the Florida Industrial Commission notified Nash that her claim for unemployment compensation had been reexamined and that, under Section 443.06(4) of the Florida Unemployment Compensation Law, she was "disqualified beginning January 31, 1965, and for the duration of [her] unemployment which is due to the labor dispute at [the Company]." (R. 3, 35.) Section 443.06 provides:

> An individual shall be disqualified for [unemployment] benefits * * * (4) For any week with respect to which the commission finds that his total or partial unemployment is due to a labor dispute in active progress which exists at the factory, establishment or other premises at which he is or was last employed * * *.

Nash appealed to the Appeals Referee of the Florida Industrial Commission, who found that Nash was entitled to unemployment compensation for the period starting on May 16, when she had been laid off, to June 17, when she filed charges with the Board. As to that period, the Referee's opinion states (R. 39):

> As [Nash] was separated from her job on May 16, 1965, due to "slow production" and did not dispute such separation until June 17, 1965, it should be held that she is qualified for benefits * * * for the period beginning May 16, 1965, to June 17, 1965. Granted, there was a labor dis-

> pute in active progress * * * on May 16, 1965, (such dispute being the labor controversy manifested by the charges with the National Labor Relations Board filed on April 6, 1965, by those workers who were not returned to their jobs and those charges being unresolved and pending * * * on May 16, 1965). But [Nash's] becoming unemployed on May 16, 1965, was not due to this dispute.

On the other hand, the Referee found that Nash became disqualified for compensation on June 17, when she filed charges with the Board contesting her layoff, and remained disqualified until she was reemployed on October 5. The Referee stated (R. 38):

> * * * These charges being filed and being unresolved and pending as of the date [Nash] returned to work constitute a labor dispute in active progress at the premises at which she was last employed between Nash and the [Company]. Consequently, here, it should be deemed that any unemployment [Nash] experienced during the period beginning June 17, 1965, to October 5, 1965, is due to a labor dispute in active progress at the premises at which she was last employed and she participated in such dispute. * * * [4]

The Florida Industrial Commission summarily affirmed the Referee's decision (R. 48), and the

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[4] The Referee also found that Nash was disqualified for the period January 31 to April 14, since her unemployment then was due to a strike against the Company in which she participated (R. 36, 38). Nash had neither claimed nor received benefits for that period.

Florida District Court of Appeal denied review (R. 58-59).[5]

DISCUSSION

The Florida unemployment compensation law disqualifies an individual for compensation for any week in which he was unemployed "due to a labor dispute in active progress which exists at the factory * * * at which he * * * was last employed" (Section 443.06(4)). The Florida Industrial Commission has held that the mere filing of unfair labor practice charges with the Labor Board, alleging that employment was terminated in violation of the National Labor Relations Act, creates a disqualifying "labor dispute" within the meaning of the statute. The decision below leaves no doubt that, but for the filing of charges, petitioner would have been entitled to continue receiving benefits. Thus the referee explicitly found that petitioner was qualified for benefits at the time she was laid off because the lay-off was not due to a labor dispute, that she remained qualified up to the date on which charges were filed, but that her unemployment thereafter is "deemed" to be due to a labor dispute (R. 38-39). Although petitioner urges, *inter alia*, that the decision below abridges the privileges and immunities of national citizenship and,

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[5] At each stage of the proceedings below Nash urged that a construction of the Florida Unemployment Compensation Act that would deny her benefits because she authorized the filing of charges with the Board would violate both the supremacy clause of the United States Constitution and the privileges and immunities clause of the Fourteenth Amendment (R. 22-25, 41-42, 50).

hence, violates the Fourteenth Amendment (Pet. 13-15), we confine ourselves here to showing that the decision must be set aside as inconsistent with the National Labor Relations Act.

1. Within broad limits, Florida is unquestionably free to prescribe the conditions upon which employees are entitled to receive the benefits of the State's unemployment compensation system. Nevertheless, a "state may not so deal with matters left to its control as to stand 'as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Bethlehem Steel Co.* v. *New York State Labor Relations Board*, 330 U.S. 767, 773. Thus, this Court has frequently set aside State regulatory schemes found to impair rights created by the National Labor Relations Act. See *Hill* v. *Florida*, 325 U.S. 538;[6] *Auto Workers* v. *O'Brien*, 339 U.S. 454; cf. *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236. And the conditions that a State may impose upon a grant of benefits are likewise subject to scrutiny to insure consistency with federal policy. It is quite clear a State cannot condition the grant of benefits in a manner that undermines rights protected by the Constitution or frustrates federal legislation. See *Sherbert* v. *Verner*, 374 U.S. 398; *Speiser* v. *Randall*, 357 U.S. 513; *Terral* v. *Burke Construction Co.*, 257 U.S. 529; Note, *Un-*

[6] In *Hill*, a Florida statute precluding persons from acting as union business agents, unless they first obtained a license from, and met certain qualifications imposed by, the State, was struck down as an undue interference with the employees' right freely to choose their own bargaining representatives, guaranteed by Section 7 of the National Labor Relations Act.

constitutional Conditions, 73 Harv. L. Rev. 1595 (1960).

In the exercise of its powers under the Commerce Clause, Congress has authorized the Labor Board to serve as a tribunal for the prevention of the unfair labor practices proscribed in Section 8 of the National Labor Relations Act and the protection of the rights guaranteed by Section 7 of the Act. The Board's adjudicatory function under Section 10 of the Act is thus an integral part of the congressional labor program. Section 10 presupposes that employees and other individuals are free to file with the Board charges that unions or employers have committed unfair labor practices. Indeed, as the Board has pointed out, the right to file such charges is "indispensable to the administration of the Act." *Local 138, Operating Engineers (Skura)*, 148 NLRB 679, 681. For, although Section 10(a) of the Act empowers the Board to prevent unfair labor practices,[7] and thus to protect the employees' Section 7 rights, Section 10(b) conditions the exercise of that power on the filing of charges;[8] the Board cannot initiate its

[7] Section 10(a) provides, in pertinent part: "The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: * * *."

[8] Section 10(b) provides, in pertinent part: "Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect * * *."

own processes. *Hercules Powder Co.* v. *National Labor Relations Board*, 297 F. 2d 424, 433 (C.A. 5). Accordingly, protection of the right to file charges with the Board is a critical prerequisite to the protection of other rights under Section 7 and to the effective discharge of the Board's statutory responsibilities.

The importance to the congressional scheme of protecting employees' freedom of access to the Board's processes is manifested by Section 8(a)(4) of the Act which expressly makes it an unfair labor practice for an employer to discriminate against an employee because he has filed charges.[9] Furthermore, it has been held that the right to file charges with the Board is encompassed within the rights guaranteed to employees by Section 7 of the National Labor Relations Act—so that an employer violates Section 8(a)(1), and a union Section 8(b)(1)(A), if either restrains an employee in the exercise of his right to file such charges.[10]

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[9] *John Hancock Mutual Life Insurance Co.* v. *National Labor Relations Board*, 191 F. 2d 483, 485-486 (C.A.D.C.); *National Labor Relations Board* v. *Lamar Creamery Co.*, 246 F. 2d 8, 9-10 (C.A. 5); *National Labor Relations Board* v. *Syracuse Stamping Co.*, 208 F. 2d 77, 80 (C.A. 2). See also *Local 743, Int. Ass'n of Machinists* v. *United Aircraft Corp.*, 337 F. 2d 5, 8-9 (C.A. 2) (right to file charges with the Board cannot be contracted away).

[10] *National Labor Relations Board* v. *Clearfield Cheese Co.*, 213 F. 2d 70 (C.A. 3), enforcing 106 NLRB 417, 418 (employer promise of benefit to induce withdrawal of charges); *Gibbs Corp.*, 131 NLRB 955, 956, n. 1, 963, enforced, 308 F. 2d 247 (C.A. 5) (discharge of employee believed to have filed charges); *Roberts* v. *National Labor Relations Board*, 350

2. The right to file charges, which has thus been protected against pressure from employers and unions, is here gravely prejudiced by the ruling of the Florida Industrial Commission. Respondent employer [11] urges that Florida has "merely put Petitioner to an election of rights, remedies and forums" (Stanley Br. in Opp. 23; R. 27). Accepting that characterization, we deny that a State can force such an election where, as here, to do so is to exact a heavy price for the assertion of a federally created right. *Terral* v. *Burke Constr. Co.*, 257 U.S. 529. We think that this is particularly clear where, contrary to the Commission's

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F. 2d 427 (C.A.D.C.), enforcing 148 NLRB 674 (union fine for filing charges); *Local 138, Operating Engineers (Skura)*, 148 NLRB 679 (union fine); *Cannery Workers Union, etc.*, 159 NLRB No. 47, enforcement pending (C.A. 9) (union expulsion).

Cf. *Industrial Union of Marine and Shipbuilding Workers* v. *National Labor Relations Board* (C.A. 3), June 22, 1967, 65 LRRM 2629. Although the court there set aside the Board's finding (see 159 NLRB No. 95) that the union violated Section 8(b)(1)(A) of the Act by expelling an employee for filing charges with the Board without first exhausting internal union procedures, we believe that the court's decision is erroneous and in conflict with *Roberts, supra*. In any event, the court recognized that, in some instances at least, the right to file a charge with the Board is protected by Section 7 of the Act (see 65 LRRM at 2630-2631, 2632). See, also, *Moving Picture Machine Operators* v. *National Labor Relations Board*, (C.A. 3) August 1, 1967, 65 LRRM 3020.

[11] Stanley Building Specialties and its parent firm, The Stanley Works, were parties to the proceedings below. Their interest in the cases lies in the fact that their experience rating under the Florida unemployment compensation system would be adversely affected if petitioner's claim is allowed. See R. 28.

view (Commission Br. in Opp. 14-15), public rather than "purely private" rights are at stake. See *National Licorice Co.* v. *National Labor Relations Board*, 309 U.S. 350, 362-363.[12]

Where a wage-earner has been laid off for reasons he believes to be invalid under the National Labor Relations Act, the practical significance of the choice with which Florida confronts him is obvious. On the one hand, he can promptly obtain unemployment compensation payments which may tide him over until he can find other employment. Alternatively, he can forego such payments and file charges with the Labor Board, in the hope that, after perhaps protracted litigation, he will be awarded reinstatement with back pay. The choice is thus between the immediate and the eventual, the certain and the conjectural. We cannot doubt that those alternatives are likely to deter resort to the Labor Board. Even though an award of back pay is potentially greater than the payments available under unemployment compensation, unemployed workers of modest means will be hard pressed to pursue the remedy supplied by Congress if the State can require them to forego a present income as the price of doing so.

We note also that the Florida decision provides a potent weapon for combating unionization. An em-

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[12] In *National Licorice, supra,* this Court observed: "The proceeding authorized to be taken by the Board under the National Labor Relations Act is not for the adjudication of private rights. * * * The Board acts in a public capacity to give effect to the declared public policy of the Act to eliminate and prevent obstructions to interstate commerce * * *." 309 U.S. at 362.

ployer desirous of defeating a union drive might well be encouraged to discharge union adherents, in the expectation that the discharged employee would be more likely to collect unemployment compensation than to file charges with the Board, and that the cost of increased contributions to the State unemployment insurance fund would be small in comparison to the cost of having to deal with a union.[13]

In these circumstances, we see no escape from the conclusion that the decision below seriously impedes freedom of access to the Board, that it materially impairs the capacity of the Board to vindicate important public rights, and that it therefore subverts the policies announced by Congress in the National Labor Relation Act.

3. Finally, we do not believe that the decision below can be justified as necessary for the protection of any State interest of compelling importance to which the federal law must or should defer. Petitioner was denied benefits under a provision of the Florida statute that disqualifies persons whose unemployment is "due to a labor dispute." This statutory disqualification, which appears in the unemployment compensation laws of all the States, has been thought to take account of the voluntary character of unemployment resulting

[13] Numerous states have statutory provisions substantially identical to those of Florida. See Lewis, *Unemployment Compensation in Labor Disputes*, 34-35, 37-38 (Upjohn Institute for Employment Research, 1964). If the Florida interpretation of its law is allowed to stand, there is a danger that these other States will adopt a similar interpretation of their laws.

from labor disputes and the desire of States to remain neutral and refrain from subsidizing either side in labor-management controversies, especially where the payment of benefits to strikers might tend to prolong the work stoppage. See Lewis, *The Concept of "Labor Dispute" in State Unemployment Insurance Laws*, 8 B.C. Ind. & Comm. L. Rev. 29 (1966); Lesser, *Labor Disputes and Unemployment Compensation*, 55 Yale L.J. 167 (1945); cf. *Unemployment Compensation Commission of Alaska* v. *Aragon*, 329 U.S. 143. We recognize that the application of these principles may raise extremely difficult questions in particular cases. Thus, when employees are thrown out of work through an anticipatory shut down (see *Mortensen* v. *Board of Review*, 21 N.J. 242, 121 A.2d 539) or a lockout (see *In the Matter of North River Logging Co.*, 15 Wash. 2d 204, 130 P.2d 64), it may be doubted that they are voluntarily unemployed, although there may be an element of voluntariness in the underlying controversy. Nevertheless, a State may reasonably determine to provide insurance against unemployment that results from relatively impersonal, cyclical economic forces but not from the intentional use of work stoppages as a weapon in labor-management warfare.

In all events, the resolution of these difficult questions and their bearing on the National Labor Relations Act need not be reached here because the Florida Commission found that petitioner's unemployment was not caused by the strike or the controversy that led to the strike. The Appeals Referee rejected the contention, advanced by respond-

ent employer (R. 25-26), that petitioner's unemployment was caused by the underlying labor dispute: "Granted, there was a labor dispute in active progress at the employer's premises when claimant was separated from her job * * *. But appellant's becoming unemployed on May 16, 1965, was not due to this dispute" (R. 39). On the contrary, the referee found that petitioner's separation from her job was due to "slow production" and that she was entitled to benefits up to June 17, 1965, because she "did not dispute such separation" until that date (R. 39).[14] In short, the circumstance which was deemed to constitute the disqualifying "labor dispute" was the result rather than the cause of her unemployment.[15]

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[14] While the statute on its face would seem to contemplate disqualification only where a labor dispute causes unemployment, the referee appears to have applied an irrebutable presumption to bring the facts found within the statutory language, for he stated that "it should be deemed that any unemployment [petitioner] experienced during the period beginning June 17, 1965 * * * is due to a labor dispute * * *" (R. 38).

[15] As we have noted above (p. 3, n. 3), the Labor Board recently sustained the unfair labor practice charges that had been filed on behalf of Nash and a number of her co-workers. 166 NLRB No. 110 (August 8, 1967). The Board held that it was incumbent upon the employer to lay off employees hired as strike replacements before laying off reinstated strikers and that, had the employer discharged the replacement workers, he would not have had occasion to lay off any of the reinstated strikers. The Board's decision is, of course, irrelevant to the prior decision of the Florida Industrial Commission, which must be evaluated in terms of its own findings of fact. In any event, although the Board, in resolving the dispute that caused the strike, found that Nash was

We submit that, whatever reasons a State may have for denying compensation when unemployment results from a dispute, no reason for disqualification has been suggested—and none can be readily imagined—where the dispute results from the unemployment. The argument presented by the employer (R. 27) that petitioner might enjoy a windfall if she was paid compensation and was subsequently awarded back pay by the Labor Board is wholly without merit since the State is free to recoup compensation payments made during any period covered by a back pay award. See *National Labor Relations Board* v. *Gullett Gin Co.*, 340 U.S. 361, 365 n.1. Nor can it be supposed that the State has any valid policy of discouraging the assertion of the rights conferred by the National Labor Relations Act. As this Court said in a different context, "the policy of the federal Act is the prevailing policy in every state." *Testa* v. *Katt*, 330 U.S. 386, 393. We conclude that the denial of unemployment compensation to those who challenge the validity of their dismissal from work (hereby filing charges with the National Labor Relations Board) cannot serve any legitimate State interest; it can only penalize employees for the exercise of rights Congress determined to protect.

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improperly laid off, it was not that dispute, but the one that began with the filing of Nash's charge with the Board, that the Florida Industrial Commission found disqualifying. The Board's adjudication of Nash's charge does not distinguish it, in any relevant sense, from the perfectly common situation where an employee alleges that he was laid off in disregard of his seniority rights or on some mistaken factual premise, such as poor health or absenteeism.

CONCLUSION

For the foregoing reasons, the order of the court below should be reversed, and the case should be remanded to it with instructions to set aside the decision of the Florida Industrial Commission insofar as it denies unemployment compensation to petitioner for filing a charge with the National Labor Relations Board.

Respectfully submitted.

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